Motion to Reopen

General MTR by the Respondent

Generally, only one motion to reopen may be filed before the Immigration Court. INA § 240(c)(7); 8 C.F.R. § 1003.23(b)(1). Such a motion must be filed within ninety days of the entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1).[1] The motion must state new facts that will be proven at a hearing if the motion is granted and must be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3). A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence offered is material, was not available, and could not have been discovered or presented at the former hearing. 8 C.F.R. § 1003.23(b)(3); see also Ke Zhen Zhao v. U.S. Dep't of Justice, 265 F.3d 83, 90 (2d Cir. 2001) (stating that a motion to reopen must be supported by new evidence; a motion that is based upon an error of law or fact in the original decision is treated as a motion to reconsider). Additionally, any motion to reopen for the purpose of applying for relief from removal, deportation, or exclusion must be accompanied by the appropriate application for relief and all supporting documents. 8 C.F.R. § 1003.23(b)(3). Finally, the Immigration Judge has discretion to deny a motion to reopen even if the moving party demonstrates prima facie eligibility for relief.[2] 8 C.F.R. § 1003.23(b)(3).

Based on the "departure bar" regulation, 8 C.F.R. § 1003.2(d), the BIA does not have authority to reopen removal, deportation, or exclusion proceedings *sua sponte* if the alien has departed the United States after those administrative proceedings have been completed. Xue Yong Zhang v. Holder, 617 F.3d 650, 652 (2d Cir. 2010) (finding that the BIA's interpretation of the regulation, in Matter of Armendarez-Mendez, 24 I&N Dec. 646 (BIA 2008), is not plainly erroneous and is therefore entitled to deference). However, the Second Circuit held that the "departure bar" does not apply to the statutory motion to reopen pursuant to INA § 240(c)(7). Luna v. Holder, 637 F.3d 85, 100 (2d Cir. 2011) (rejecting Matter of Armendarez-Mendez, 24 I&N Dec. 646, 653-60 (BIA 2008), with regard to statutory motions to reopen). Accordingly, the BIA must adjudicate a statutory motion to reopen regardless of whether the alien has departed the United States, either voluntarily or pursuant to an order of removal.[3] Luna, 637 F.3d at 101-102. In so holding, the Second Circuit noted that it was not deciding the validity of the departure bar regulation "in every possible context" and that the bar would continue to operate in the context of a regulatory (i.e., *sua sponte*) motion to reopen. Luna, 637 F.3d at 102.

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[1] There is no exception to the ninety-day filing deadline where an alien fails to receive a properly mailed removal order. Ping Chen v. U.S. Attorney Gen., 502 F.3d 73, 77 (2d Cir. 2007) (per curiam).

[2] A motion to reopen to apply for a form of discretionary relief will not be granted if the alien's right to apply for such relief was fully explained to her or him by the Immigration Judge at a previous hearing. 8 C.F.R. § 1003.23(b)(3). The Supreme Court in Kucana v. Holder, 130 S.Ct. 827 (2010), has clarified that the circuit courts have jurisdiction to review discretionary denials of motions to reopen under the "abuse of discretion" standard.

[3] See also Matter of Bulnes-Nolasco, 25 I&N Dec. 57, 59 (BIA 2009) (holding that an alien's departure from the United States while under an outstanding order of deportation or removal issued *in absentia* does not deprive the Immigration Judge of jurisdiction to entertain a motion to rescind the order if the motion is premised on lack of notice); 8 C.F.R. § 1003.23(b)(4)(iii)(A)(2).

Equitable Tolling of Ninety-day Filing Period for Ineffective Assistance of Counsel

A motion to reopen must be filed within ninety days of the date of entry of a final administrative order of removal, deportation, or exclusion. 8 C.F.R. § 1003.23(b)(1). However, the ninety-day filing period may be equitably tolled to accommodate claims of ineffective assistance of counsel. Iavorski v. INS, 232 F.3d 124, 134 (2d Cir. 2000). For an untimely claim to receive the benefit of equitable tolling, the alien must demonstrate not only that his constitutional right to due process was violated by the conduct of counsel, but that he also exercised due diligence in pursuing the case during the period he seeks to toll. Iavorski v. INS, 232 F.3d at 135. The Second Circuit has held that the respondent must show that he or she exercised due diligence both *before and after* he or she had or should have discovered the ineffective assistance of counsel; in other words, it is the respondent's burden to demonstrate that he exercised due diligence during the entire period he or she seeks to toll.[4] Rashid v. Mukasey, 533 F.3d 127, 132 (2d Cir. 2008); see also Cekic v. INS, 435 F.3d 167, 171-72 (2d Cir. 2006) (finding that the relevant date for determining whether the petitioners had exercised due diligence was when they learned that they had been denied TPS status in 2000, not when they finally retained new counsel in late 2002).

Although the Second Circuit has stated that there is "no magic period of time – no *per se* rule – for equitable tolling premised on ineffective assistance of counsel," Jian Hua Wang v. BIA, 508 F.3d 710, 715 (2d Cir. 2007), it has consistently held that a respondent who waits approximately two years or longer to take steps to reopen a proceeding has failed to demonstrate due diligence. See, e.g., Zheng Zhong Chen v. Gonzales, 437 F.3d 267, 269-70 (2d Cir. 2006) (holding that the BIA did not abuse its discretion in refusing to equitably toll the time limit for filing a motion to reopen where the respondent waited twenty months to raise the ineffective assistance claim and nothing indicated that he exercised diligence in pursuing the claim during those twenty months); Ali v. Gonzales, 448 F.3d 515, 517-18 (2d Cir. 2006) (over seven years); Zhao Quan Chen v. Gonzales, 492 F.3d 153, 155 (2d Cir. 2007) (over three years); Cekic, 435 F.3d at 171-72 (two years); Iavorski, 232 F.3d at 129-35 (two years); but see Jin Bo Zhao v. INS, 452 F.3d 154, 159 (2d Cir. 2006) (holding that the BIA erred in denying a motion to reopen where the ineffective assistance of the respondent's first attorney in filing the first motion to reopen, combined with the respondent's "impressive diligence" in retaining new counsel and promptly filing a second motion, justified the equitable tolling of the time and numerical limitations).

[4] In making this finding, the Second Circuit did recognize that aliens in removal/deportation proceedings may reasonably rely upon "assurances [from counsel] that their case[s] [are] being pursued" based on the alien's unfamiliarity with immigration law. Rashid, 533 F.3d at 132 n.3 (quoting Cekic, 435 F.3d at 171). Moreover, because aliens are oftentimes "unfamiliar with our language and culture," reasonable reliance on misadvice from an attorney may constitute ineffective assistance of counsel. Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008). However, "even an alien who is unfamiliar with the technicalities of immigration law can, under certain circumstances, be expected to comprehend that he has received ineffective assistance without being explicitly told so by an attorney." Rashid, 533 F.3d at 132 n.3.

A motion to reopen alleging ineffective assistance of counsel must include: (1) an affidavit by the respondent detailing the agreement entered into with former counsel;[5] (2) evidence that former counsel has been informed of the allegations leveled against him or her and that he or she has been afforded the opportunity to respond;[6] and (3) information about whether a complaint has been filed with the appropriate disciplinary authorities.[4] See Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988). Additionally, the petitioner must demonstrate that he was prejudiced by the performance of his counsel. Esposito v. INS, 987 F.2d 108, 111 (2d Cir. 1993); Rashid, 533 F.3d at 131 ("[T]he alien must allege facts sufficient to show (a) that competent counsel would have acted otherwise, and (b) that he was prejudiced by his counsel's performance.") (internal citations omitted); Vartelas v. Holder, 620 F.3d 108, 115 (2d Cir. 2010) (finding that a respondent must show that he or she was prejudiced but declining to set a standard for the prejudice prong of an ineffective assistance of counsel claim). The Second Circuit requires only "substantial compliance" as opposed to "slavish adherence" to the Lozada requirements. Yi Long Yang v. Gonzales, 478 F.3d 133, 142-43 (2d Cir. 2007); see also Debeatham v. Holder, 602 F.3d 481 (2d Cir. 2010) (affirming IJ's denial of an ineffective assistance claim where petitioner failed to offer evidence of his agreement with former attorney regarding the handling of the issue in question, failed to notify him of his alleged ineffectiveness, failed to notify the appropriate disciplinary board, and failed to demonstrate that his former attorney's alleged ineffective assistance actually resulted in prejudice).

Reopening Sua Sponte

Despite the general time and number limitations on motion to reopen, an Immigration Judge may reopen any case in which he or she has rendered a decision at any time if jurisdiction has not vested with the BIA. 8 C.F.R. § 1003.23(b)(1); see also Li Yong Zheng v. U.S. Dep't of Justice, 416 F.3d 129, 131 (2d Cir. 2005) (recognizing that the BIA has the authority to reopen any case *sua sponte* at any time); see also Cyrus v. Keisler, 505 F.3d 197, 202 (2d Cir. 2007) (holding that the Circuit Court lacks jurisdiction to review a decision by the BIA not to exercise its discretion and reopen a case *sua sponte*).[7] The Immigration Judge's *sua sponte* authority is not "a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but [is] an extraordinary remedy reserved for truly exceptional situations." Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999). Exceptional circumstances that may result in hardship warrant an exercise of the Court's discretion when reopening would serve the interest of justice. See Iavorski, 232 F.3d at 130-32 (discussing the history of motions to reopen and that Congress did not intend the motion to reopen limitations to

[5] See Piranej v. Mukasey, 516 F.3d 137, 144-45 (2d Cir. 2008) (remanding to the BIA to determine whether "the existence of a general retainer agreement can give rise to ineffective assistance of counsel claims in the immigration/removal context," where the BIA determined that the affidavit submitted by petitioner did not provide sufficient detail about the exact parameters of the relationship between the petitioner and his attorney).

[6] The purpose of the second requirement is to provide attorneys an opportunity to respond to allegations which might call into question the reputation of the attorney as competent counsel. Lozada, 19 I&N Dec. at 639.

[7] "[W]ith regard to untimely or number-barred motions to reopen, we conclude that *sua sponte* reopening of exclusion, deportation, or removal proceedings pending a third party's adjudication of an underlying application that is not itself within our jurisdiction ordinarily would not be warranted as a matter of discretion." Matter of Yauri, 25 I&N Dec. 103, 110 (BIA 2009).

be inflexible); see also G-D-, 22 I&N Dec. at 1134; Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997). However, the BIA has cautioned that the Courts should not use their independent regulatory power "casually" to set aside motion limits, G-D-, 22 I&N Dec. 1132, 1134, or to circumvent the regulations. J-J-, 21 I&N Dec. at 984.

Moreover, the Second Circuit has recognized the BIA's authority to limit its own *sua sponte* authority in the context of petitioners who have already been removed. Xue Yong Zhang v. Holder, 617 F.3d 650, 660-61 (2d Cir. 2010) (affirming BIA's decision finding that it lacks *sua sponte* jurisdiction to reopen the case of a petitioner who has already been removed).

Motion to Reopen filed by DHS

Motions to reopen filed by DHS in removal[8] proceedings are not subject to any time or numerical limitations. 8 C.F.R. § 1003.23(b)(1). Motions to reopen must state new facts that will be proven at a hearing to be held if the motion is granted and must be supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.23(b)(3). An Immigration Judge will not grant such a motion unless the evidence offered is material and was unavailable and could not have been discovered or presented at a prior hearing. 8 C.F.R. § 1003.23(b)(3).

Motion to Reopen by DHS to Terminate[9] Grant of Asylum or Withholding of Removal[10]

Time and numerical restrictions do not apply to motions to reopen filed by DHS in removal[11] proceedings. 8 C.F.R. § 1003.23(b)(1). Motions to reopen must state new facts that will be proven at a hearing to be held if the motion is granted and must be supported by affidavits or other evidentiary material. 8 C.F.R. § 1003.23(b)(3). An Immigration Judge will not grant such a motion unless the evidence sought to be offered is material and was unavailable and could not have been discovered or presented at a prior hearing. 8 C.F.R. § 1003.23(b)(3).

[8] Time and numerical limitations also do not apply to motions filed by DHS in exclusion or deportation proceedings if the motion to reopen is based on fraud in the original proceeding or on a crime that would warrant termination of asylum in accordance with 8 C.F.R. § 1208.22(e). 8 C.F.R. § 1003.23(b)(1).

[9] Termination of a grant of asylum or withholding of removal may occur prior to the initiation of removal proceedings by DHS or in conjunction with removal proceedings. 8 C.F.R. § 1208.24(e).

[10] An Immigration Judge may reopen proceedings for the purpose of terminating a grant of withholding of removal. 8 C.F.R. § 1208.24(f). Once proceedings are reopened, DHS must establish, by a preponderance of the evidence, at least one of the termination grounds outlined in 8 C.F.R. § 1208.23(b). 8 C.F.R. § 1208.24(f). Such grounds include evidence that the alien is no longer entitled to relief based on a fundamental change in circumstances relating to his or her original claim, a showing of fraud in the alien's application such that he or she was not eligible for withholding at the time it was granted, or evidence indicating that the alien committed any act that would have been grounds for denial under INA § 241(b)(3)(B) had it occurred prior to the grant of relief. 8 C.F.R. § 1208.23(b).

[11] Time and numerical limitations also do not apply to motions filed by DHS in exclusion or deportation proceedings if the motion to reopen is based on fraud in the original proceeding or on a crime that would warrant termination of asylum in accordance with 8 C.F.R. § 1208.22(e). 8 C.F.R. § 1003.23(b)(1).

An Immigration Judge may reopen proceedings for the purpose of terminating a grant of asylum. 8 C.F.R. § 1208.24(f). Once proceedings are reopened, DHS must establish, by a preponderance of the evidence, at least one of the grounds for termination outlined in 8 C.F.R. § 1208.24(a). 8 C.F.R. § 1208.24(f). Such grounds include a showing of fraud in the alien's asylum application such that he or she was not eligible for asylum at the time relief was granted, 8 C.F.R. § 1208.24(a)(1); evidence indicating that one or more conditions outlined in INA § 208(c)(2) exist, 8 C.F.R. § 1208.24(a)(2); or as to applications filed before April 1, 1997, a demonstration that the alien no longer has a well-founded fear of persecution based on changed country conditions, 8 C.F.R. § 1208.24(a)(3).

Jointly Filed Motion to Reopen

Generally, a motion to reopen must be filed within ninety days of the date of entry of a final administrative order of removal, deportation, or exclusion, and only one motion to reopen may be filed. 8 C.F.R. § 1003.23(b)(1). However, when a motion to reopen is agreed upon by all parties and jointly filed, the time and numerical limitations do not apply. 8 C.F.R. § 1003.23(b)(4)(iv).

MTR to Apply for Asylum, Withholding, or CAT[12]

Time and numerical limitations for filing a motion to reopen do not apply if the basis of the motion is to apply for asylum under INA § 208, withholding of removal under INA § 241(b)(3), or withholding of removal under the Convention Against Torture, if the claim is based on "changed country conditions arising in the country of nationality or the country to which removal has been ordered" and such evidence is material, was unavailable, and could not have been discovered or presented at the prior proceeding. INA § 208(a)(2)(D); 8 C.F.R. § 1003.23(b)(4)(i); see also Matter of J-G-, 26 I&N Dec. 161 (BIA 2013). An alien who is subject to an in absentia removal order need not first rescind the order before seeking reopening of the proceedings to apply for asylum and withholding of removal based on changed country conditions arising in the country of the alien's nationality or the country to which removal has been ordered. Matter of J-G-, 26 I&N Dec. 161, 168 (BIA 2013).

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[12] The filing of a motion to reopen to apply for asylum, withholding of removal under INA § 241(b)(3), or withholding of removal under CAT does not automatically stay the removal of the alien. However, an alien may request a stay, and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. 8 C.F.R. § 1003.23(b)(4)(i).

An alien with a final order of deportation, exclusion, or removal entered before March 22, 1999, may move to reopen for the sole purpose of applying for protection under CAT. 8 C.F.R. § 1208.18(b)(2). Such motion must be filed "within June 21, 1999," and the evidence submitted in support of the motion must establish a prima facie case compelling the Court to withhold or defer the alien's removal pursuant to 8 C.F.R. § 1208.16(c) or § 1208.17(a). 8 C.F.R. §§ 1208.18(b)(2)(i)-(ii). The phrase "within June 21, 1999" has been interpreted to mean that the alien who was ordered removed or whose removal orders became final before March 22, 1999, and who seeks to apply for relief under CAT, must file a motion to reopen no later than June 21, 1999. Qi Hang Guo v. U.S. Dep't of Justice, 422 F.3d 61, 63 (2d Cir. 2005). Such motions shall be governed by the regulations for motions to reopen set forth in 8 C.F.R. § 1003.23; however, time and numerical limitations do not apply, and the alien shall not be required to show that the evidence sought to be offered was unavailable and could not have been discovered or presented at the prior hearing. 8 C.F.R. § 1208.18(b)(2).

Changed *personal* circumstances are not changed country conditions and thus cannot be the basis to reopen proceedings under 8 C.F.R. § 1003.23(b)(4)(i). Matter of C-W-L-, 24 I&N Dec. 346 (BIA 2007) (an alien subject to a final order of removal is barred by both statute and regulation from filing an untimely motion to reopen removal proceedings to submit a successive asylum application based on changed personal circumstances); Yuen Jin v. Mukasey, 538 F.3d 143 (2d Cir. 2008); see, e.g., Wei Guang Wang v. BIA, 437 F.3d 270, 274 (2d Cir. 2006) (holding that the birth of the petitioner's two children in the United States was evidence of his changed personal circumstances, as opposed to changed country conditions in China, and for purposes of the exception to the ninety-day filing deadline for a motion to reopen, this "self-induced change in personal circumstances cannot suffice"); see also Li Yong Zheng v. U.S. Dep't of Justice, 416 F.3d 129 (2d Cir. 2005) (holding that arrival of petitioner's wife in the United States and her pregnancy with their second child were changed personal circumstances, rather than changed circumstances in China).

In a motion to reopen based on changed country conditions, if the applicant introduces previously unavailable country condition reports that materially support his original asylum claim, the Court must consider these reports and issue a reasoned decision based thereon, whether or not the reports are clearly determinative. Poradisova v. Gonzales, 420 F.3d 70, 78 (2d Cir. 2005); see also Shou Yung Guo v. Gonzales, 463 F.3d 109, 114-15 (2d Cir. 2006) (remanding to the BIA to determine whether documents suggesting an official policy of forced sterilization in China are authentic and establish the existence of an official policy of forced sterilization of parents of two or more children); cf. Matter of S-Y-G-, 24 I&N Dec. 247 (BIA 2007) (holding that a respondent who submitted evidence that Chinese nationals with children born abroad are subject to sanctions for violating the country's family planning policy failed to meet her burden for a motion to reopen).

A subsequent asylum application is properly viewed as a new application if it presents a previously unraised basis for relief or is predicated on a new or substantially different factual basis. Matter of M-A-F-, 26 I&N Dec. 651 (BIA 2015). This suggests that reopening may be limited only to the previously-presented claim which is now subject to changed circumstances rather than being reopened for the presentation of all claims.

However, an alien may request, as a basis for a motion to reopen *sua sponte*, under 8 C.F.R. § 1003.23(b)(1), permission to file an untimely, successive application for asylum based on "changed circumstances which materially affect [her/his] eligibility for asylum." INA § 208(a)(2)(D). In this regard, and at the Immigration Judge's discretion, changed circumstances may not be limited to changed country conditions and may include changed personal circumstances. 8 C.F.R. § 1208.4(a)(4).

Reopening after Order of Removal in Absentia

An order entered *in absentia* in removal proceedings may be rescinded only (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that his failure to appear was because of exceptional circumstances, or (ii) upon a motion to reopen filed at any time if he demonstrates that he did not receive due notice or that he

was in federal or state custody and his failure to appear was through no fault of his own. 8 C.F.R. § 1003.23(b)(4)(ii). The failure to appear because of "exceptional circumstances"[13] refers to circumstances beyond the control of the alien, such as battery or extreme cruelty[14] to the alien or to the alien's parent or child, serious illness of the alien, and serious illness or death of an immediate relative, but not including less compelling circumstances.[15] INA § 240(e)(1).

The BIA's standard for exceptional circumstances "appears fairly stringent, both in terms of the required severity of the circumstances and the proof required to establish a claim." Alrefae v. Chertoff, 471 F.3d 353, 358 (2d Cir. 2006). Even an exceptional circumstance identified by the statute, "serious illness," normally requires "specific, detailed medical evidence to corroborate the alien's claim." Id.; see Matter of B-A-S-, 22 I&N Dec. 57, 58-59 (BIA 1998) (finding that a "twisted foot" would not rise to the level of a serious illness, and in any case the applicant failed to provide any medical evidence of the severity of his injury); Matter of J-P-, 22 I&N Dec. 33, 34-35 (BIA 1998) (holding that an applicant's statement that he has a strong headache constituted insufficient evidence to demonstrate that he suffered from a serious illness); but see Matter of Kanwaljit Singh, Respondent, 21 I&N Dec. 998, 1000 (BIA 1997) (where it is uncontested that the applicant provided sufficient evidence of his step-son's illness causing a fifteen-minute delay in arrival for a deportation hearing, he demonstrated exceptional circumstances). Similarly regarding circumstances not specifically identified by the statute, unsupported factual allegations are insufficient to demonstrate the exceptional nature of those circumstances. See Eltayeb v. Ingham, 950 F. Supp. 95, 100-01 (S.D.N.Y. 1997) (an Immigration Judge did not err in finding that an attorney's allegations of his client's car breakdown did not establish "exceptional circumstances" as compelling as serious illness or death).

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[13] Ineffective assistance of counsel may constitute an exceptional circumstance that warrants a reopening of proceedings. See Omar v. Mukasey, 517 F.3d 647 (2d Cir. 2008) (affirming IJ's decision to deny motion to reopen where respondent had failed to comply with requirements of Matter of Lozada). [SEE PAGE 3 FOR LOZADA REQUIREMENTS]. The Second Circuit has held that a lawyer who misadvises his client concerning the date of an immigration hearing and then fails to inform the client of the deportation order entered *in absentia*, or the ramifications thereof, has provided ineffective assistance that would constitute exceptional circumstances, and such misadvice may constitute ineffective assistance even where it is supplied by a paralegal providing scheduling information on behalf of a lawyer. Aris v. Mukasey, 517 F.3d 595, 601 (2d Cir. 2008). [SEE PAGES 2-3 FOR THE DUE DILIGENCE REQUIREMENT].

[14] Battery and extreme cruelty were added to the definition of "exceptional circumstances" by section 813 of the Violence Against Women Act of 2005 ("VAWA 2005"). This amendment applies to a failure to appear that occurs at any time, even before the date of the enactment of VAWA 2005. Public Law 109-162; INA § 240(e) n.30.06.

[15] In Kulhawik v. Holder, 571 F.3d 296 (2d Cir. 2009), the Second Circuit held that an alien was properly notified of an upcoming hearing through personal service of a notice of hearing, and even though the BIA erred in failing to consider an affidavit submitted by the alien's attorney, exceptional circumstances were not present and the BIA's error did not warrant remand. 571 F.3d at 299. The alien's stated reasons for failing to appear at his hearing were that: (1) due to his lack of knowledge of the English language, he misunderstood the Immigration Judge's instruction concerning his future hearing; and (2) the alien believed that there would be another letter from the court informing him about a new hearing date. Kulhawik, 571 F.3d at 299. The Second Circuit noted that even if the alien had difficulty understanding the Immigration Judge's oral instructions, the affidavit submitted by his attorney contained no claim that the alien could not understand the contents of the notice of hearing informing petitioner of his obligation to appear. Kulhawik, 571 F.3d at 299.

The issue in a claim of nonreceipt under INA § 240(b)(5)(C)(ii) is not whether the notice was properly *mailed* but whether the alien *received* the notice. Alrefae v. Chertoff, 471 F.3d 353, 359 (2d Cir. 2006); see also Lopes v. Gonzales, 468 F.3d 81, 84 (2d Cir. 2006). However, there is a presumption that properly mailed notices are received by the addressee. Alrefae, 471 F.3d at 358-59. The BIA has held that where an NTA or notice of hearing is properly addressed and sent by regular mail according to normal office procedures, there is a presumption of delivery, but it is weaker than the presumption that applies to documents sent by certified mail. Matter of M-R-A-, 24 I&N Dec. 665, 673 (BIA 2008).

Where evidence indicates that a respondent would have appeared at his immigration proceedings had he actually received notice of his hearing, the Second Circuit held that all of the respondent's evidence (circumstantial or otherwise) should be considered to determine whether the presumption of receipt of first class mail has been overcome. Silva-Carvalho Lopes v. Mukasey, 517 F.3d 156, 160 (2d Cir. 2008). The BIA has noted that an Immigration Judge may consider affidavits from the respondent and others who are knowledgeable about whether notice was received, whether due diligence was exercised in seeking to redress the situation, any prior applications for relief that would indicate an incentive to appear, the respondent's prior appearance at immigration proceedings, if applicable, and any other circumstances indicating nonreceipt of the notice. M-R-A-, 24 I&N Dec. at 674. Additionally, the respondent can overcome the presumption of delivery by submitting an affidavit that the respondent did not receive the notice and that he had continued to reside at the address at which it was sent, as well as other circumstantial evidence indicating that he had an incentive to appear, and by exercising due diligence in promptly seeking to redress the situation by obtaining counsel and requesting reopening of the proceedings. Matter of C-R-C-, 24 I&N Dec. 677, 680 (BIA 2008).

Reopening after Order of Deportation in Absentia prior to June 13, 1992

In Matter of Cruz-Garcia, the BIA held that the regulations at 8 C.F.R. § 1003.23(b)(4)(iii) apply only to *in absentia* deportation orders entered pursuant to former INA § 242B, but not to *in absentia* deportation orders entered pursuant to former INA § 242(b). 22 I&N Dec. 1155, 1158-59 (BIA 1999).[16] Former § 242(b) governed deportation proceedings prior to June 13, 1992, and former § 242B governed deportation proceedings between June 13, 1992, and March 31, 1997.[17] Id. at 1156 n.1. The Board explained that the applicable regulations mirror the statutory language of former § 242B, which set a 180-day time limit on motions to reopen *in absentia* deportation proceedings, but that the statutory language of former § 242(b) contained no time or numerical limitations on motions to reopen such proceedings. Id. at 1158. Therefore, there are no time or numerical limitations on motions to reopen *in absentia* deportation proceedings governed by former § 242(b). Id. at 1158-60. In Cruz-Garcia, the Board further held that an alien seeking to reopen *in absentia* deportation proceedings governed by former § 242(b) must demonstrate "reasonable cause" for his failure to appear, rather than the

[16] Cruz-Garcia references the regulations at 8 C.F.R. § 3.23(b)(4)(iii), which are now located at 8 C.F.R. § 1003.23(b)(4)(iii).

[17] Since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, effective April 1, 1997, removal proceedings have been governed by INA § 240. Cruz-Garcia, 22 I&N Dec. at 1156 n.1.

more stringent showing of "exceptional circumstances" required by the current regulation. 22 I&N Dec. at 1159.

Reopening after Order of Deportation in Absentia between June 13, 1992, and March 31, 1997

An order entered *in absentia* in deportation proceedings may be rescinded only (i) upon a motion to reopen filed within 180 days after the date of the order of deportation, if the alien demonstrates that his failure to appear was because of exceptional circumstances, or (ii) upon a motion to reopen filed at any time, if he demonstrates that he did not receive notice or he demonstrates that he was in federal or state custody and his failure to appear was through no fault of his own. 8 C.F.R. § 1003.23(b)(4)(iii). The failure to appear because of "exceptional circumstances" refers to circumstances such as serious illness or death of an immediate relative, but not including less compelling circumstances. 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1). Proper notice includes personal service and, when the alien does not appear physically before the Immigration Judge, service by certified mail to the alien's last known address (even if the notice is returned as unclaimed) or to the alien's counsel of record. Song Jin Wu v. INS, 436 F.3d 157, 162 (2d Cir. 2006); Matter of Grijalva, 21 I&N Dec. 27 (1995). See also Matter of G-Y-R-, 23 I&N Dec. 181, 189 (BIA 2001) (If the notice reaches "the correct address but does not reach the alien through some failure in the internal workings of the household, the alien can be charged with receiving proper notice, and proper service will have been effected.").

An IJ retains jurisdiction to consider a motion to reopen even where a respondent self-deported while under an order of deportation and re-entered the United States illegally and the motion to reopen is based on lack of notice. See Matter of Bulnes-Nolasco, 25 I&N Dec. 57, 58-59 (BIA 2009).

Reopening after Order of Exclusion in Absentia

An order entered *in absentia* in exclusion proceedings may be rescinded on the basis that the Immigration Judge improperly entered an *in absentia* order if the alien provides evidence that he had "reasonable cause" for his failure to appear. 8 C.F.R. § 1003.23(b)(4)(iii)(B). Unlike the standard in removal or deportation proceedings, the BIA has held that time and numerical limitations do not apply to aliens who file motions to reopen exclusion proceedings conducted *in absentia*. Matter of N-B-, 22 I&N Dec. 590 (BIA 1999); cf. 8 C.F.R. §§ 1003.23(b)(4)(ii)-(iii). In N-B-, he BIA found that, although the subheading at 8 C.F.R. § 1003.23(b)(4)(iii) signals that the regulation provides a time exception for motions to reopen both for deportation and exclusion proceedings conducted *in absentia*, the regulation itself provides a time exception only for motions to reopen deportation proceedings. N-B-, 22 I&N at 592; 8 C.F.R. § 1003.23(b)(4)(iii)(A)(1). The regulation is silent as to what specific time exception applies to motions to reopen exclusion proceedings conducted *in absentia*. N-B-, 22 I&N at 592; 8 C.F.R. § 1003.23(b)(4)(iii)(B). Therefore, an alien may file a motion to reopen at any time after the entry of an order of exclusion *in absentia* so long as he demonstrates he had "reasonable cause" for his absence. N-B-, 22 I&N at 592-93; 8 C.F.R. § 1003.23(b)(4)(iii)(B).

Special Motions to Reopen to Seek Relief under Former INA § 212(c)

Pursuant to 8 C.F.R. § 1003.44(a);

> [C]ertain aliens who formerly were lawful permanent residents, who are subject to an administratively final order of deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and 8 C.F.R. § 1212.3 with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997. A special motion to seek relief under section 212(c) of the Act will be adjudicated under the standards of this section and 8 C.F.R. § 1212.3. This section is not applicable with respect to any conviction entered after trial.

Reopening under § 1003.44 is available only to those aliens who can demonstrate eligibility for relief under INA § 212(c). 8 C.F.R. § 1003.44(b); Cyrus v. Keisler, 505 F.3d 197, 201 (2d Cir. 2007).

Motion to Reopen to Apply for Adjustment of Status

In Matter of Velarde, the BIA held:

> [A] properly filed motion to reopen may be granted, in the exercise of discretion, to provide an alien an opportunity to pursue an application for adjustment where the following factors are present: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, 21 I&N Dec. 541 (BIA 1996),[18] or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) [DHS] either does not oppose the motion or bases its opposition solely on Matter of Arthur, 20 I&N Dec. 475 (BIA 1992).[19]

[18] In Shaar, the BIA ruled that an alien who files a motion to reopen and subsequently overstays his or her voluntary departure period is statutorily ineligible for suspension of deportation absent a showing of "exceptional circumstances." 21 I&N Dec. 548-49; but see Barrios v. Attorney Gen. of U.S., 399 F.3d 272, 276-77 (3d Cir. 2005) (holding that the court's failure to address a timely filed motion to reopen within the alien's voluntary departure period can constitute "exceptional circumstances").

[19] In Arthur, the BIA ruled that a motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of proceedings could not be granted unless the visa petition was approved. 20 I&N Dec. at 479. The BIA modified the Arthur decision in Matter of Velarde-Pacheco, 23 I&N Dec. 253, 256 (BIA 2002). The BIA then held that a motion to reopen to apply for adjustment of status, based on a marriage entered into after the commencement of proceedings, may be granted in the exercise of discretion, despite the fact that the application had yet to be adjudicated, as long as:

> (1) the motion to reopen is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, 21 I&N Dec.

23 I&N Dec. 253, 256 (BIA 2002). In Melnitsenko v. Mukasey, 517 F.3d 42 (2d Cir. 2008), the Second Circuit held that the BIA "exceeded its allowable discretion in treating the fifth Velarde factor as dispositive and in denying the respondent's motion to reopen based solely on the fact that the DHS opposed the motion." 517 F.3d at 51.[20]

Likewise, in Matter of Lamus-Pava, the BIA held that a motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of removal proceedings may not be denied under the fifth factor enumerated in Velarde, 23 I&N Dec. 253, based on the mere fact that DHS has filed an opposition to the motion, *without regard to the merit of that opposition*. 25 I&N Dec. 61, 64-65 (BIA 2009). The BIA noted that the fifth factor set out in Velarde does not grant DHS "veto" power over an otherwise approvable motion to reopen. Lamus-Pava, 25 I&N Dec. at 64-65. The arguments advanced by DHS in opposition to a motion should be considered in adjudicating the motion, but they should not preclude the Immigration Judge or the BIA from exercising "independent judgment and discretion" in ruling on the motion as provided for in 8 C.F.R. § 1003.1(d)(1)(ii). Lamus-Pava, 25 I&N Dec. at 65.

The BIA has additionally found that the ninety-day filing deadline applies to motions to reopen *in absentia* for the purposes of adjustment of status, even if the order was issued before the 1996 Amendments. Matter of Monges, 25 I&N Dec. 246 (BIA 2010) (finding no conflict between the ninety-day filing limit in 8 C.F.R. § 1003.23(b)(1) and the five-year limitation on discretionary relief found in former INA § 242B(e)(1)).

With limited exception, USCIS maintains jurisdiction over adjustment of status applications of arriving aliens. 8 C.F.R. § 245.2(a)(1); Matter of Yauri, 25 I&N Dec. 103, 107 (BIA 2009); but see Sheng Gao Ni v. Bd. of Immigration Appeals, 520 F.3d 125, 129 (2d Cir. 2008) (holding that the BIA erred in denying motions to reopen on jurisdictional grounds to applicants seeking adjustment of status with USCIS when it failed to provide a "rational explanation" for denying the motions and instead relied on a "rote recital of a jurisdictional statement.") . Furthermore, "the existence of a final order of removal does *not* preclude the

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> 541 (BIA 1996), or on any other procedural grounds; (4) clear and convincing evidence is presented indicating a strong likelihood that the marriage is bona fide; and (5) [DHS] does not oppose the motion or bases its opposition solely on Matter of Arthur, 20 I&N Dec. 475 (BIA 1992).

Velarde-Pacheco, 23 I&N Dec. at 253.

[20] In Melnitsenko, the Second Circuit further states: "In so holding, we do not intend to suggest that the BIA may not *consider* objections made by the DHS. As the BIA noted, the DHS may indeed be 'in a better position' than the BIA to identify additional factors that 'militate against reopening.' However, the BIA must, in accordance with its duties in adjudicating motions to reopen, provide sufficient explanation for its decisions in order to provide this Court a meaningful opportunity to review those decisions. Thus, we now hold that when the DHS opposes a motion to reopen, the BIA may not deny the motion based solely on the *fact* of the DHS's objection. Moreover, if the BIA denies a motion to reopen based on the *merits* of the DHS's objection, the BIA must provide adequate reasoning as to why the objection calls for denial of the motion to reopen in the exercise of discretion, in order to provide a meaningful opportunity for judicial review." 517 F.3d at 51-52 (internal citations omitted).

USCIS from granting adjustment of status to an arriving alien who is otherwise eligible . . . ." Yauri, 25 I&N Dec. at 107 (emphasis in original). However, the BIA noted that the "stay" authority granted to it by 8 C.F.R. § 1003.2(f) "does not provide general authority to grant stays of administratively final orders in conjunction with matters over which we have no authority." Yauri, 25 I&N Dec. at 109. The BIA further noted that a request for a stay of execution of a removal order should go to DHS, the agency with jurisdiction over the adjustment application. Yauri, 25 I&N Dec. at 109.

Reviewability of Motions to Reopen based on IJ Discretion

In Kucana v. Holder, the United States Supreme Court held that the INA's bar of judicial review of discretionary determinations of the Attorney General does not extend to decisions to deny a motion to reopen. 130 S.Ct. 827 (2010) (discussing INA § 242(a)(2)(B)). The INA precludes judicial review of "any other decision or action of the Attorney General . . . the authority for which is specified *under this title* to be in the discretion of the Attorney General." INA § 242(a)(2)(B)(ii) (emphasis added). The Supreme Court noted that the discretionary element of a motion to reopen is conferred by regulation, not statute, and is thus open to judicial review. Kucana, 130 S.Ct. at 840; 8 C.F.R. § 1002.23(b)(3); see also Luna v. Holder, 637 F.3d 85 (2d Cir. 2011) (noting that agency denials of statutory motions to reopen are subject to meaningful judicial review).